



UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTICE AND OPPORTUNITY FOR COMMENT

PROPOSED AMENDMENTS TO THE CIRCUIT RULES AND PROPOSED ADDITION TO RULES FOR JUDICIAL CONDUCT AND JUDICIAL DISABILITY PROCEEDINGS

Pursuant to 28 U.S.C. § 2071(b), comments are invited on proposed amendments to:

- Ninth Circuit Rule 36-2
- Ninth Circuit Rule 46-5
- Circuit Advisory Committee Note to Ninth Circuit Rule 27-1

In addition, we are seeking comments with regard to a proposed addition to the Judicial Council's Rules for Judicial Conduct and Judicial Disability Proceedings.

New language is underscored; abrogated language is stricken.¹

Please direct comments no later than August 2, 2010 to:

Molly C. Dwyer, Clerk of Court at Molly_Dwyer@ca9.uscourts.gov and
Cole Benson, Supervising Deputy at Cole_Benson@ca9.uscourts.gov

¹ For Circuit Advisory Committee Note to Ninth Circuit Rule 27-1, both clean and red-lined versions are provided.

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Ninth Circuit Rule 36-2
Criteria for Publication

A written, reasoned disposition shall be designated as an OPINION ~~only~~ if it:

- (a) Establishes, alters, modifies or clarifies a rule of federal law, or
- (b) Calls attention to a rule of law that ~~which~~ appears to have been generally overlooked, or

. . . .

Purpose of Amendment: Clarify standards governing determination to deem a disposition appropriate for publication.

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Ninth Circuit Rule 46-5
Restrictions on Practice by Former Court Employees

No former employee of the Court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule.

~~If it is shown that this rule would cause a substantial hardship with reference to a particular case, [A]~~n attorney who is a former employee may apply to the Court for an exemption. The application must demonstrate that there has been a strict compliance with the rule with reference to the particular case, ~~and in all other matters,~~ that the attorney had no direct or indirect involvement with the case during employment with the Court, and that the attorney was not employed or assigned in the chambers of any judge who participated in the case during the attorney's employment with the court.

Purpose of Amendment: Clarify the time period of employment that would bar an appearance by a former employee, particularly with regard to post-disposition filings.

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(As Proposed)

Circuit Advisory Committee Note to Rule 27-1

(1) Motions Acted on by the Appellate Commissioner. *The Appellate Commissioner is an officer appointed by the court. The court has delegated broad authority under FRAP 27(b) to the Appellate Commissioner to review a wide variety of motions, e.g., appointment, substitution and withdrawal of counsel and motions for reinstatement. The Appellate Commissioner may deny a motion for dispositive relief, but may not grant such a request other than those filed under FRAP 42(b).*

(2) Motions Acted on by a Single Judge. *Under FRAP 27(c), a single judge may grant or deny any motion which by order or rule the court has not specifically excluded, but a single judge may not dismiss or otherwise effectively determine an appeal or other proceeding. Thus, a single judge may not grant motions for summary disposition, dismissal, or remand. A single judge may grant or deny temporary relief in emergency situations pending full consideration of the motion by a motions panel. In addition, some types of motions may be ruled on by a single judge by virtue of a particular rule or statute.*

(3) Motions Acted on by Motions Panels

(a) Motions Heard by the Motions Panels. *The motions panel shall rules on substantive motions, including motions to dismiss, for summary affirmance, and similar motions. The Court has determined that in the interest of uniformity, motions for bail are considered by a three-judge motions panel.*

(b) Selection of Motions Panels. *Judges are ordinarily assigned to the three-judge motions panel on a rotating basis by the Clerk for a term of one month. A single motions panel is appointed for the entire circuit.*

(c) Procedures for Disposition of Motions by the Motions Panel. *All three judges of the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges; if in agreement, they ordinarily decide the motion. The third judge participates only if*

(i) one of the other members of the panel is disqualified or is otherwise unavailable; or

(ii) the other members of the panel disagree on the disposition of a motion or he or she is requested to participate by the other members of the panel.

A motions panel sits in San Francisco for several days each month. If necessary, emergency motions are acted on by telephone. (See Cir. R. 27-3 through 27-4 and Advisory Committee Notes thereto.)

(4) Motions for Clarification, Reconsideration or Rehearing.

Motions for clarification, reconsideration or rehearing of a motion are disfavored by the Court and are rarely granted. The filing of such motions is discouraged. (See Circuit Rule 27-10 as to time limits on filing motions for reconsideration.) (rev. 7/95, 7/98)

(5) Position of Opposing Counsel. *Unless precluded by extreme time urgency, counsel are encouraged to make every attempt to contact opposing counsel before filing any motion and to either inform the court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position.*

(6) Request to Amend the Briefing Schedule: *A party may request modification of the briefing schedule in conjunction with any request for other relief. The request for modification of the briefing schedule should be included in the legend as well as the body of the motion for other relief. (New 7/1/2000)*

(7) Requests for Judicial Notice: *Requests for judicial notice and responses thereto filed during the pendency of the case are retained for review by the panel that will consider the merits of a case. The parties may refer to the materials the request addresses with the understanding that the Court may strike such references and related arguments if it declines to grant the request.*

Cross Reference: Advisory Committee Note regarding Habeas Corpus procedures; Advisory Committee Note to Rule 27-3 regarding emergency motions; Circuit Rule 25-2, Communications to the Court; FRAP 32(c), Form of Other Papers; FRAP 40(b), Petition for Panel Rehearing, Form of Petition; Length.

Purpose of Amendment: Provide more concise explanation of internal motions procedure; eliminate language that replicates provisions of circuit rules

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(Red-lined Version)

Circuit Advisory Committee Note to Rule 27-1

(1) Motions Acted on by the Appellate Commissioner. *The Appellate Commissioner is an officer appointed by the court. The court has delegated broad authority under FRAP 27(b) to the Appellate Commissioner to review a wide variety of motions, e.g., ~~formerly ruled on by judges.~~ For example, the Appellate Commissioner rules on most motions concerning the appointment, substitution and withdrawal of counsel and, ~~motions for reinstatement, motions for leave to intervene and motions to seal or unseal documents.~~ The Appellate Commissioner*

may deny a motion for dispositive relief, but may not grant such a request other than those filed under FRAP 42(b).

(2) Motions Acted on by a Single Judge. Under FRAP 27(c), a single judge may grant or deny any motion which by order or rule the court has not specifically excluded, but a single judge may not dismiss or otherwise effectively determine an appeal or other proceeding. Thus, a single judge may not grant motions for summary disposition, dismissal, or remand. A single judge ~~is not authorized to grant or deny in its entirety a motion for stay or injunction pending appeal, but~~ may grant or deny temporary relief in emergency situations pending full consideration of the motion by a motions panel. ~~(See infra.)~~ In addition, some types of motions may be ruled on by a single judge by virtue of a particular rule or statute. ~~For example, a single judge is authorized to grant a certificate of appealability. (See 28 U.S.C. § 2253, FRAP 22.)~~

(3) Motions Acted on by Motions Panels

(a) Motions Heard by the Motions Panels. The motions panel shall rules on substantive motions, including motions to dismiss, for summary affirmance, ~~for bail and similar motions.~~ The court has determined that in the interest of uniformity, motions for bail are considered by a three-judge motions panel.

(b) Selection of Motions Panels. Judges are ordinarily assigned to the three-judge motions panel on a rotating basis by the Clerk for a term of one month. ~~The panels are normally composed of three circuit judges in active service, but any senior circuit judge who is willing to serve may be assigned to the panel. The three judges serving on the motions panel rotate as lead judge, second judge and third judge.~~ A single motions panel is appointed for the entire circuit.

(c) Procedures for Disposition of Motions by the Motions Panel. All three judges of the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges; if in agreement, they ordinarily decide the motion. The third judge participates only if

- (i) one of the other members of the panel is disqualified or is otherwise unavailable; or

- (ii) the other members of the panel disagree on the disposition of a motion; or ~~(iii)~~ he or she is requested to participate by the other members of the panel.

~~The A motions panel sits in San Francisco for several days each month approximately every ten days. Motions are presented orally to the panel by the motions attorneys or court law clerks when the panel sits. For complex motions, the motions attorneys or court law clerks may prepare and transmit to the panel in advance bench memoranda, the moving papers and relevant portions of the record. Motions are referred by the clerk's office to the motions attorneys, who transmit~~

~~them to the judges of the motions panel. If necessary, emergency motions are acted on by telephone. (See Cir. R. 27-3 through 27-4 and Advisory Committee Notes thereto.)~~

~~(d) **Motions for Bail.** Despite the provisions of FRAP 27(c), conferring broad powers upon single judges to dispose of motions and the power granted "any judge or justice" to grant bail or other relief, see 18 U.S.C. § 3041, the court has determined that in the interest of uniformity, motions for bail are neither granted nor denied by one judge. Therefore, it is required that motions for bail be routed through the clerk's office and considered by a three-judge motions panel. (See Cir. R. 9-1.1 and 9-1.2 as to the required form and content of motions for bail pending trial or appeal.)~~

~~(4) **Motions for Clarification, Reconsideration or Rehearing.** A motion for clarification, reconsideration, or rehearing of an order entered by a single judge or the appellate commissioner is referred to that judge or the commissioner. If that individual declines to grant reconsideration, rehearing, or clarification, the motion is referred to the current motions panel.~~

~~A motion for clarification, rehearing or reconsideration of an order issued by a motions panel is referred to the panel that entered the order, unless the case has been assigned to a panel on the merits. (In the latter case, the motion is referred to the merits panel.)~~

Motions for clarification, reconsideration or rehearing of a motion are disfavored by the Court and are rarely granted. The filing of such motions is discouraged. (See Circuit Rule 27-10 as to time limits on filing motions for reconsideration.) (rev. 7/95, 7/98)

(5) Position of Opposing Counsel. Unless precluded by extreme time urgency, [C]ounsel are ~~encouraged to make every attempt to~~ contact opposing counsel before ~~prior to the filing of~~ any motion and to either inform the court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position.

(6) Request to Amend the Briefing Schedule: A party may request modification of the briefing schedule in conjunction with any request for other relief. The request for modification of the briefing schedule should be included in the legend as well as the body of the motion for other relief. (New Note 7/1/2000)

(7) Requests for Judicial Notice: Requests for judicial notice and responses thereto filed during the pendency of the case are retained for review by the panel that will consider the merits of ~~the~~ a case. The parties may refer to the materials the request addresses with the understanding that the Court may strike such references and related arguments if it declines to grant the request.

Cross Reference: Advisory Committee Note regarding Habeas Corpus procedures;

Advisory Committee Note to Rule 27-3 regarding emergency motions; Circuit Rule 25-2, Communications to the Court; FRAP 32(c), Form of Other Papers; FRAP 40(b), Petition for Panel Rehearing, Form of Petition; Length.

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Judicial Council
Rules for Judicial Conduct and Judicial Disability Proceedings

Local Rule 6.1: Acknowledgment.

In the complaint, complainant must write out the following acknowledgment: “I understand that even if I successfully prove that the judge engaged in misconduct or is disabled, this procedure cannot change the outcome of my underlying case.” Complainant may either write this acknowledgment in the space provided in Section 6 of the complaint form, or complainant must write out the acknowledgment on the first page of the complaint. If complainant fails to write out the acknowledgment, the complaint will be returned to complainant with a request to do so.

Purpose of Addition: Does not amend any rule that is already in place, but instead supplements the Rules for Judicial Conduct and Judicial Disability Proceedings; deter use of the misconduct process as an alternative appellate forum.